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Supreme Court, U.S.
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No. 02-1107

In The

Supreme Court of the United States

UNITED STATES OF AMERICA ex rel. MARTIN BECKER,

Petitioner,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Per United States Supreme Court Rule, 15.6, this is a reply to the new points made in the Brief in Opposition submitted in the instant case, on March 31, 2003.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FOURTH CIRCUIT OPINION DOES CONFLICT WITH DECISIONS OF THIS COURT AND THE FCA.

Respondent Westinghouse argues that the Fourth Circuit opinion does not conflict with the 1986 amendments to FCA or the Court's decision in *Hughes Aircraft v. United States ex. rel. Schumer*, 520 U.S. 939 (1997). (Response, pp.3-4). A plain reading of the lower court opinion demonstrates that the Fourth Circuit applied the FCA as it existed prior to the 1986 amendments, and thus conflicts with *Hughes* and 1986 amendments to the FCA. Accordingly, the lower court opinion affirmed a grant of summary judgment based on government agency knowledge of unauthorized expenditure. After quoting from *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 545 (7th Cir. 1999), that "the government's knowledge effectively negates the fraud or falsity required by the FCA," the Fourth Circuit opinion held:

> DOE's full knowledge of the material facts underlying any representations implicit in Westinghouse's conduct negates any knowledge that Westinghouse had regarding the truth or falsity of those representations. (App. 15, 30).

It is thus clear that the Fourth Circuit opinion upheld prior disclosure to the government as a full defense in this case.

However, as noted by this Court in *Hughes,* the 1986 amendments to the FCA "eliminates a defense to a *qui tam* suit - - prior disclosure to the Government." 520 U.S. at 948. The Fourth Circuit opinion conflicts with *Hughes* by holding that the Government's (DOE's) knowledge negates any knowledge that Westinghouse had. Moreover, this holding is a direct application of the pre-1986 law that Government knowledge is a valid defense. On this basis the Court of Appeals affirmed the grant of summary judgment in favor of Westinghouse.

As further evidence that the Fourth Circuit applied the pre-1986 law, the Court of Appeals opinion recognized that the FCA imposes civil liability on any person who knowingly makes, uses, or causes to be made or used, a false record or statement and that a person acts "knowingly" if he or she knows the record or statement is false or acts in deliberate ignorance of, or with reckless disregard for, the truth or falsity of the record or statement. (App. 11, 26). Notwithstanding Respondent's argument to the contrary (Response, p. 2,

Fn. 1), the Court of Appeals opinion also recognized that the evidence did not show that Congressional approval for the use of the funds at issue was given (App. 8, Fn. 3), that "Westinghouse was aware of the uncertainty ... regarding Congressional authority for the appropriation transfer" of the $12 Million, (App. 9, 24), and, it "is possible to infer from the evidence that ... Westinghouse at least negligently disregarded whether Congress had approved the appropriation transfer," (App. 12, 27), when using these public funds "for plant expenditures unrelated" (App. 9, 24) to the purpose for which the funds had been appropriated by Congress.

The Court of Appeals opinion thus recognizes that the elements necessary to impose civil liability on Westinghouse are present in this case. The opinion recognizes that Westinghouse was aware (knew) Congressional approval was not given (App. 9, 24) and Westinghouse recklessly disregarded whether Congressional approval was given (App. 12, 27), but nonetheless used $12 Million of public funds for purposes unrelated to the purpose for which the funds were appropriated. On these findings, summary judgment could not be granted if the 1986 FCA amendments were applied.

Nevertheless, the Fourth Circuit concluded that because "DOE had at least as much knowledge as Westinghouse regarding Congressional authority for the transfer," (App. 12, 27) government knowledge negated any knowledge that Westinghouse had, and on this basis affirmed the grant of summary judgment. But the Fourth Circuit, in so holding, explicitly applies

pre-1986 law which makes Government knowledge a defense. Allowing Government knowledge as a defense squarely conflicts with the pronouncement of this Court in *Hughes* that the 1986 amendments to the FCA "eliminates" prior disclosure to the Government as a defense to a *qui tam* suit. Thus, the Fourth Circuit opinion not only conflicts with the pronouncement of this Court in *Hughes*, but also disregards the Congressional enactment of the 1986 FCA amendments eliminating prior disclosure to the Government as a defense. The Fourth Circuit opinion applies the same law that Congress repealed when it amended the FCA in 1986.

Petitioner's reasoning is reinforced by this Court's March 10, 2003 opinion in *Cook County v. United States ex. rel. Chandler*, 538 U.S., (No. 01-1572, decided March 10, 2003) in which this Court cited *Hughes* with approval and noted:

> The basic purpose of the 1986 amendments was to make the FCA a "more useful tool against fraud in modern times." S. Rep., at 2. Because Congress was concerned about pervasive fraud in "all Government programs" *ibid.*, it allowed private parties to sue even based on information already in the Government's possession. *Cook County*, Slip Op. at 12.

CONCLUSION

This Court's repeated recognition that Government agency knowledge is not a defense, and certainly not an *absolute* defense, to a FCA claim warrants a grant of certiorari, or summary reversal in light of both *Hughes* and *Cook County*, because the Court of Appeals opinion applied pre-1986 amendment law making Government knowledge an *absolute* defense in this case.

Respectfully submitted,

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